

The Last Civilian Court-Martial and Its Aftermath

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Judge Miner here describes his defense of a person he believes to be the last civilian tried by court martial. The trial was conducted in Korea in 1958 during Judge Miner's service as an officer in the Judge Advocate General's Corps of the United States Army. Although a challenge to the jurisdiction of the court martial was rejected and the civilian defendant convicted of violating a currency regulation, the conviction was set aside for another reason urged at trial—the inadvertent repeal of the at-issue regulation. The Article also includes a review of legal developments that occurred in the aftermath of the trial, including the Supreme Court's ultimate determination that courts-martial have no jurisdiction over civilians, and the passage of the Military Extraterritorial Jurisdiction Act to allow for prosecution in United States District Courts of civilians employed by or accompanying the Armed Forces overseas.

I. INTRODUCTION

I believe that George E. Mountz was the last American civilian tried by general court-martial. The trial was held over a period of four days in August of 1958 at Camp Red Cloud, I Corps (First Corps) Headquarters, Uijongbu, Korea.¹ The story of this court-martial is a cautionary tale, for it demonstrates the limitations and rigidity of the military justice system. Echoes of Mountz's case may be heard in recent congressional legislation providing for federal court jurisdiction over civilians who commit offenses while accompanying the Armed Forces as employees of military contractors. And the case has reverberated in my mind for nearly five decades, because it was I who conducted the defense of Mr. Mountz during the course of my service in the United States Army as an officer in the Judge Advocate General Corps (JAGC). What follows, therefore, is memoir as well as exegesis.

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¹ See generally Verbatim Record of Trial (and accompanying papers) of Mountz, George E., United States Civilian Accompanying the Armed Forces (U.S. Army) in Korea, by General Court-Martial Appointed by Commanding General, I Corps (Group), Tried at APO 358, Uijongbu, Korea, on Aug. 6, 20–22, 1958, Case No. 400777 (on file with author and available at Judge Advocate General Office (JAGO), Court-Martial Records, Wash. D.C.) [hereinafter Record].

II. THE ROAD TO KOREA

My path to the defense of Mr. Mountz commenced with my graduation from New York Law School and admission to the New York State Bar in 1956. Having been deferred from the draft during my student days, I soon found myself the recipient of the inevitable notice that I had been selected to serve my country. I have no idea why they call it "selective service." Those who chose me to serve were not being very "selective."

As an enlisted man, I received basic military training at Fort Knox, Kentucky, then, as now, the center of armored warfare training in the United States.² The basic training experience that stands out in my mind was a disciplinary punishment imposed upon me by the First Sergeant of my basic training company. It seems that I improperly anticipated the establishment of sanitary facilities during a field maneuver. For this transgression, the sergeant directed me to use my entrenching tool (a small shovel carried in a soldier's backpack) to dig a "six-by-six" hole. Experienced soldiers know this to mean a hole six feet long, six feet wide, and six feet deep. I dug a hole six feet long and six feet wide but only one inch deep. When the Company Commander (CO) asked me what I was doing, I told him how the hole came to be. I explained that the sergeant had not used the phrase "six by six by six" and, therefore, had not specified the depth of the hole. The CO opined that I was correct and could stop digging. Thereafter, I was on the sergeant's "[bleep] list," and he referred to me regularly as "that smart-ass lawyer." I was to meet the CO once again when I briefly visited the demilitarized zone in Korea and found him serving there. I was then his equal in rank, and he said that—for that reason—I was his most successful graduate.

After basic training, I was assigned to the 510th Quartermaster Company, Fort Lee, Virginia. As our bus drove up to the unit's headquarters, I observed a sign out front: "510th QM Co. (BKRY)." I naturally assumed that this was an important Army unit, perhaps dealing with intelligence matters, for which I was qualified by my educational background. Much to my consternation, I learned that BKRY meant bakery and that the mission of the unit was to go into the field, raise a large tent, provision that tent with mobile bakery equipment, and bake bread for the troops in the field. To his great credit, the unit CO designated me Assistant Company Clerk rather than Baker. He said that my higher education warranted the former designation.

² See U.S. Army Armor School & University of Mounted Warfare Home Page, <http://www.knox.army.mil/school/> (last visited Jan. 26, 2006) ("The Armor School is the rock on which the Armor Center mission is built. Its staff sections, directorates and units provide the personnel, equipment and guidance needed to train the officers, NCOs and enlisted soldiers in the execution of armored warfare and the development of its doctrine.").

Just prior to my induction as a draftee, I had applied for a reserve commission in the Army JAGC, but I had heard nothing since filing my application. Then, on a fateful afternoon in November 1956, the First Sergeant of the 510th found me in the barracks, advised me that my commission had come through, and saluted me. I thus passed from the rank of Private E-1 to First Lieutenant in one fell swoop. My active-duty status as “an officer and gentleman by Act of Congress” would add an additional three years to my military service. The CO of the 510th advised that “it would no longer be kosher” for me to reside in the enlisted mens’ barracks and that I should go home to prepare myself for my new assignment—the Judge Advocate General School at Charlottesville, Virginia.

My prior military service enabled me to avoid the military orientation program that was provided to my fellow students who came to their commissions directly from the private sector. I took great pleasure in telling them that they had not experienced real Army service, as had I. After a three-month course in military law, including classes held at the University of Virginia School of Law, I was certified as competent to conduct court-martial trials and was ready for my first assignment as a JAGC officer. That assignment brought me to Camp Zama, Japan, in March of 1957.

Twenty-five miles southwest of Tokyo, Camp Zama then was the headquarters of the U.S. Army Forces, Far East, and the Eighth U.S. Army. It is now Headquarters, U.S. Army Japan.³ From March 1957 to April 1958, I served with the U.S. Army Claims Service, Far East, at Camp Zama. My duties included the processing and adjudication of claims submitted to the Claims Service under the authority of the 1952 Administrative Agreement between the United States and Japan.⁴ The Administrative Agreement dealt

³ See GlobalSecurity.org, U.S. Army Japan (USARJ), <http://www.globalsecurity.org/military/agency/army/usarj.htm> (last visited Jan. 22, 2006) (“U.S. Army Japan (USARJ) is the Army Component Command (ACC) to the subordinate unified command, U.S. Forces Japan (USFJ) and is a major subordinate command (MSC) of U.S. Army Pacific.”).

⁴ Administrative Agreement Under Article III of the Security Treaty Between the United States of America and Japan, U.S.-Japan, Feb. 28, 1952, 3 U.S.T. 3341 (entered into force Apr. 28, 1952) [hereinafter the Administrative Agreement or Japan SOFA]. The Administrative Agreement is a specie of a class of agreements between or among sovereigns—agreements known as status-of-forces agreements, or SOFAs—and thus is often referred to as the “Japan SOFA.” See generally Colonel Richard J. Erickson, USAF (Ret.), *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 137, 139–140 (1994). Notably, the United States is party to over one hundred SOFAs, with various sovereign nations. See, e.g., Captain Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, ARMY LAW., Aug. 2000, at 23 n.4 (citing INTERNATIONAL & OPERATIONAL LAW DIV., OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. AIR FORCE, INTERNATIONAL NEGOTIATION & AGREEMENT HANDBOOK tab

not only with claims against the United States by nationals of Japan but also with the criminal jurisdiction of the courts of Japan over American service personnel.⁵ My service included membership on a three-member commission on foreign claims, typically involving the application and interpretation of Japanese tort and maritime law.

An incident that caused great furor in both the United States and Japan had occurred in January of 1957, before my arrival. The incident involved the shooting death of a Japanese woman, Naka Sakai, while she was collecting empty cartridge casings on an Army firing range. The soldier who fired the fatal round, Specialist Third Class William S. Girard of the 8th Cavalry Regiment, insisted that he had only been trying to scare off Mrs. Sakai, that he had not aimed the rifle at her, and that the shooting was purely accidental.⁶ Many Americans were outraged that Girard would be tried not by court-martial but by a Japanese Court, as allowed by the status-of-forces agreement (SOFA) between the United States and Japan.⁷

In November of 1957, a Japanese court handed down a three-year suspended sentence, but Girard and his Japanese wife were permitted to

18 (2000)); see also Mark J. Yost & Douglas S. Anderson, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 AM. J. INT'L L. 446, 451 (2001).

⁵ Under Article XVII of the Japan SOFA, "the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces" was accorded to the United States. Japan SOFA, *supra* note 4, at art. XVII, 3 U.S.T. at 3354.

⁶ For a comprehensive discussion of the legal implications of the Girard matter, see Gordon B. Baldwin, *Foreign Jurisdiction and the American Soldier: "The Adventures of Girard,"* 1958 WIS. L. REV. 52 (1958); see also Will H. Carroll, *Official Duty Cases Under Status of Forces Agreements: Modest Guidelines Toward a Definition*, 12 A.F. L. REV. 284, 286-87 (1970); John C. Broadbent, Note, *The Girard Case: Constitutionality of Status of Forces Agreements*, 19 OHIO ST. L.J. 143, 143-45 (1958).

⁷ Although the United States had the right to exercise jurisdiction over Girard in this matter, see Japan SOFA, *supra* note 4, at art. XVII, ¶ 2, 3 U.S.T. at 3354, it was not obliged to do so. Article XVII of the Japan SOFA provided that "jurisdiction [could] in any case be waived by the United States." Japan SOFA, *supra* note 4, at art. XVII, § 2, 3 U.S.T. at 3353. See generally *Wilson v. Girard*, 354 U.S. 524, 526, 530 (1957) (holding constitutional the United States' waiver of jurisdiction in Girard's case). As the Supreme Court noted:

Japan's cession to the United States of jurisdiction to try American military personnel for conduct constituting an offense against the laws of both countries was conditioned by the covenant . . . that . . . The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

Id. at 529 (internal quotations omitted).

leave the country less than one month later.⁸ The head of the Claims Service, Lieutenant Colonel Joseph L. Haefele, the Judge Advocate officer who was my immediate superior, was constrained not only to deliver compensation to the Sakai family but also to express sympathy and deep remorse on behalf of the United States, in accordance with Japanese custom.

I much enjoyed the work of the Claims Service, especially the interaction with officials of the Government of Japan and with the Japanese *Bengoshi* (i.e., lawyer) retained by the Claims Office.⁹ The *Bengoshi* taught me much about the law and customs of Japan. I also enjoyed my travels about the beautiful Japanese countryside and my exploration of the always-fascinating delights and sounds of Tokyo and Yokohama. Before long, however, I grew restive and was anxious to begin my desired career at the trial bar. I soon got my wish in the form of an order transferring me to the Office of the Staff Judge Advocate, 7th Infantry Division Headquarters, Camp Casey, Tongduchon, Korea.

III. ASSISTANT STAFF JUDGE ADVOCATE

Camp Casey was about forty miles north of Seoul along a dusty dirt road known as the MSR (main supply route). By the time I arrived, in April of 1957, the truce that ended the Korean War had been in place for more than three years.¹⁰ The country remained in a devastated condition, with a large American troop presence. The small rural village of Tongduchon lay outside the gates of Camp Casey, which essentially was composed of a series of quonset huts of different sizes. The JAGC office was housed in one such structure, and it was there that I took up my duties as Assistant Staff Judge Advocate of the Division. My duties included appearing as counsel in general courts-martial, rendering legal assistance, and reviewing board actions and inferior courts-martial. The Staff Judge Advocate for the Division was Lieutenant Colonel Jackson K. Judy of Tampa, Florida, who

⁸ See Mark Schreiber, *The Zeit Gist: True Foreign Crime*, JAPAN TIMES, Nov. 4, 2003, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.p15?fi20031104zg.htm>.

⁹ See generally Bernard W. Hoeter, *Japanese Legal Practitioners: Bengoshi and Shiho-Shoshi*, THE SCRIVENER, Dec. 2003, at 18, 19, available at http://www.notaries.bc.ca/scrivpdf/12_4_11.pdf ("The *Bengoshi*, . . . the learned barrister-advocate, acts as trial lawyer in the Higher Courts of the land in litigation for large corporations and in criminal cases."). Dr. Hoeter reported that, as of 2003, "there [were] about 16,000 practising [sic] *Bengoshi* in Japan serving a population of 130 million." *Id.*

¹⁰ The armistice ending the three-year conflict was signed on July 27, 1953, in the village of Panmunjom, near the border with North Korea. *E.g.*, Norimitsu Onishi, *At 50, the Korean Truce Defines a Generation Gap*, N.Y. TIMES, July 26, 2003, at A3.

directed a small staff of JAGC officers, including me. In a small glass case hanging on a wall in our office was a copy of the Manual for Courts-Martial in which some shrapnel had been embedded during the late hostilities. I suppose that this was to indicate that the manual was at least good for stopping shrapnel.

Soon after my arrival at the 7th Infantry Division, I finally attained my long-sought-after goal and began trying general court-martial cases. The "serious" felony cases are tried by general courts-martial and the "less serious" by special courts-martial and Article 15 disciplinary proceedings. JAGC lawyers generally are not retained in the latter two venues. I was assigned prosecution as well as defense work in the general courts-martial, and my cases for the most part revolved around incidents involving assault, larceny, absence without leave, disobedience of orders, and black-market trading. Drunkenness was a common underlying cause of the offenses prosecuted.

For my first two cases, I was assigned as trial counsel (prosecutor). When those cases resulted in findings of not guilty, Colonel Judy became apoplectic and assigned me to defense work for some time thereafter. It seems that the Commanding General, whose mess Colonel Judy attended each day, had chided him about referring for trial the cases of mine that had resulted in acquittal. In my own defense, I must say that the losses were largely attributable to the failure of Korean witnesses to identify the accused Servicemen. Indeed, one of my witnesses commented that "they all look the same to me."

IV. THE ALLEGED OFFENSE AND THE ALLEGED OFFENDER

After only four months or so of heavy trial experience, Colonel Judy handed me the assignment that recent events have refreshed in my memory. The assignment took me to I Corps Headquarters, a command organization that had but one JAGC officer, Colonel James W. Booth, who served as the Staff Judge Advocate for I Corps. He had recommended the trial of Mr. Mountz by general court-martial and did not seem to be perturbed by the fact that Mountz was a civilian. The recommendation was approved and ordered by Lieutenant General T. J. H. Trapnell, I Corps Commander. Needless to say, the trial of a civilian was a most unusual event and generated great interest, but only among local military personnel. I was constrained to devote a great deal of time to the preparation and trial of the case. Although I was not formally reassigned to I Corps, most of the work on the Mountz case took place there, which kept me away from my regular duties at 7th Division headquarters.

Mountz was employed by the Vinnell Corporation, then a California-based business. Vinnell started out in 1931 as a construction company in Los

Angeles and had become an important defense contractor by the time of the Mountz trial. The company survives today as a subsidiary of Northrop Grumman, having been owned during a period in the 1990s by the Carlyle Group. Now based in Fairfax, Virginia, Vinnell continues to provide goods and services, including security services, to the U.S. military establishment. Both individually and as a joint venturer with Brown & Root (a subsidiary of Halliburton), Vinnell has served the military in recent years in such places as Iraq, Afghanistan, and Saudi Arabia.¹¹

In 1958, Vinnell's work for the Army in Korea included the operation and maintenance of power systems for the distribution of electric power to Army facilities in the Uijongbu area and elsewhere in Korea. The power project in the I Corps area employed United States and Korean civilian personnel. George Mountz was an American citizen, whose home was in California. He was employed in Korea on a one-year contract with Vinnell, which commenced on July 1, 1957, as a senior materials supervisor for power systems. Prior to working in Korea, he had been employed in Japan on a one-year contract with Vinnell. His duties in Korea included the purchase of parts and materials for power systems. He was normally billeted at a place called Wonju, although he traveled around the I Corps area to perform his duties at various power plants and warehouses. For administrative purposes, he was attached to an Army unit, the Korean Military Advisory Group (KMAG), but he spent a good deal of his personal time in Seoul, where he developed various friendships.

The events culminating in Mountz's arrest and trial by court-martial had their inception when two officers, one of whom was assigned to the Finance Office at Camp Red Cloud, enlisted Mountz in a scheme to make money through currency trading on the Korean black market. At that time, there was a considerable "spread" between the official exchange rate (500 Korean Hwan to the U.S. dollar) and the black-market rate obtainable in Seoul (1,000 Hwan to the U.S. dollar).¹² The officers persuaded a reluctant Mountz to participate in the arbitrage scheme, which centered on checks issued by Vinnell for conversion to Korean Hwan to meet the Vinnell payroll for Korean employees. From time to time, Mountz was assigned the task of taking the checks to the Army Finance Disbursing Office and exchanging them for the Hwan necessary for payroll purposes.

¹¹ See generally Vinnell Corporation Home Page, <http://www.vinnell.com> (last visited Jan. 22, 2006).

¹² The South Korean Government replaced the Korean Hwan with the New Won on June 10, 1962. See Global Financial Data, Inc., *A Global History of Currencies, Republic of Korea*, <http://www.globalfinancialdata.com/index.php3?action=detailedinfo&id=4022#metadata> (last visited Jan. 29, 2006).

On two separate occasions in May of 1958, Mountz cashed Vinnell payroll checks in the sum of \$700 at the Finance Office and obtained military payment certificates (MPCs), the equivalent of U.S. dollars, instead of Hwan. He then took the MPCs to the quarters of the two officers, who exchanged one-half of these MPCs for Hwan that they had obtained on the black market. As the MPCs would purchase in Seoul double the Hwan that could be purchased at the Finance Office, Mountz was able to return with a full payroll for the Korean employees of the Vinnell project in the Uijongbu area, while a profit was realized by those who participated in the scheme. For his trouble, Mountz received one-third of the \$350 profit generated on each occasion.

The scheme was discovered before any other, larger payrolls could be cashed, and Mountz was arrested and confined by military authorities to the limits of Camp Red Cloud. In addition, his U.S. passport was confiscated and turned over to the military authorities and, later, to Vinnell personnel—actions that I argued were contrary to federal law. An investigation, pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ), resulted in a recommendation by the investigating officer that Mountz be tried by general court-martial for wrongfully dealing in and exchanging MPCs for Korean Hwan, in violation of Article 92 of the UCMJ. Colonel Booth concurred in the recommendation, and trial by general court-martial was directed by General Trapnell. Shortly before trial, the restraints on Mountz's movements were lifted, and he was free to move about Korea, although—because his passport remained unavailable—he was unable to leave the country. His employment with Vinnell had been terminated, and he stayed in various places as the trial moved forward.

I represented Mountz at the Article 32 investigation (the equivalent of a grand-jury investigation or preliminary hearing) to determine whether the accused should answer formal charges. The investigation hearing was brief, and only two witnesses actually testified: the non-commissioned officer who had taken a sworn statement from Mountz during the inquiry by the provost marshal into the currency violations; and the manager of the Vinnell office, who attested to a certificate, which he had signed and given to Mountz, identifying the Vinnell payroll checks and describing the instructions for dealing with those checks. Other evidence adduced at the hearing consisted of documentary evidence in the form of a summary of the expected testimony of an officer in the Army Comptroller's Office. As I did throughout the course of all the proceedings, I challenged the jurisdiction of the military to proceed against Mountz as an employee of a civilian contractor. In recommending trial by general court-martial, the investigating officer, a lieutenant colonel in the Artillery Branch, overruled my challenge *sub silentio*.

The formal instrument pursuant to which Mountz was arraigned and tried charged him in two specifications with violation of Article 92 of the UCMJ, in that he was alleged to have violated a lawful general regulation. The specifications as amended were as follows:

Specification 1: In that George E. Mountz, a United States civilian accompanying the Armed Forces in Korea, did, in conjunction with [two Army officers], at APO 358, on or about 22 May 1958, violate a lawful general regulation, to wit: paragraph 4a, c and d(1), Circular Number 756-1, Headquarters United States Armed Forces, Far East, and Eighth United States Army, dated 21 August 1956, by wrongfully dealing in and exchanging Military Payment Certificates, United States Currency, for Korean Hwan.

Specification 2: In that George E. Mountz, a United States Civilian accompanying the Armed Forces in Korea, did, in conjunction with [two Army officers], at APO 358, on or about 6 May 1958, violate a lawful general regulation, to wit: paragraph 4a, c and d(1), Circular Number 756-1, Headquarters United States Armed Forces, Far East, and Eighth United States Army, dated 21 August 1956, by wrongfully dealing in and exchanging Military Payment Certificates, United States Currency, for Korean Hwan.¹³

V. TRIAL BY COURT-MARTIAL

A. *The Trial Begins*

The trial began on August 6, 1958, and, following an adjournment on account of my trial schedule, continued from August 20 through its conclusion on August 22.¹⁴ The members of the court-martial were seated on August 6 after extensive voir dire examination. My inquiries on voir dire were designed principally to inquire into command influence, previous knowledge of the case, and relationships with those who would testify during the trial. I required that each court-martial member designated to serve by the Commanding General be examined under oath. Of the ten officers designated for service, three were excused by consent and one on my peremptory

¹³ Charge Sheet (July 12, 1958) at 2, in Record, *supra* note 1, at Ex. 1 [hereinafter Charge Sheet].

¹⁴ See generally Verbatim Record of Trial (Proper) of Mountz, George E., United States Civilian Accompanying the Armed Forces (U.S. Army) in Korea, by General Court-Martial Appointed by Commanding General, I Corps (Group), Tried at APO 358, Uijongbu, Korea, on Aug. 6, 20–22, 1958, Case No. 400777 (on file with author and available at Judge Advocate General Office (JAGO), Court-Martial Records, Wash. D.C.) [hereinafter Trial Record].

challenge.¹⁵ Early on, an objection interposed by me to the entire court, the equivalent to a "challenge to the array" in civil law, was promptly rejected.¹⁶

Of the six who would ultimately serve, there were two colonels, three lieutenant colonels, and a major. The senior-ranking colonel was designated president (i.e., foreman) of the court-martial. The Law Officer (i.e., the judge) who presided during the voir dire and at the trial was Lieutenant Colonel Victor D. Baughman, a JAGC officer assigned specifically for this trial. Trial counsel (prosecutor) was Captain Luther C. West, JAGC, regularly assigned to the KMAC. Captain West and I each were assigned a non-lawyer officer to assist.¹⁷

The trial opened with a series of three motions to dismiss, which I placed before the Law Officer. The first asserted that the regulation—a "Circular"—that Mountz was accused of violating, "Circular 756-1," had been repealed by a subsequent Circular, No. 310-1, which provided that all publications bearing a date prior to July 1, 1957, and not specifically listed in the accompanying index, were repealed.¹⁸ Trial counsel said that he would look into the matter. Following a brief adjournment, he returned with the information that a very recently declassified message at 8th Army Headquarters would put my contention to rest. The Law Officer deferred his ruling pending his receipt and review of the message.¹⁹

My second motion to dismiss was based on the contention that the original accuser, one Colonel Parker, did not possess sufficient information, or a sufficient understanding of the charges preferred, to act as the accuser. An out-of-court hearing was held in which Colonel Parker's testimony was received. I argued that the charges had been improperly prepared and improperly forwarded to the Staff Judge Advocate rather than to the Commanding General. At the end of the hearing, the Law Officer rejected this contention.²⁰

B. *A Question of Jurisdiction*

1. *The Factual Inquiry*

My third motion was based on lack of personal jurisdiction of the court-martial over Mountz as a civilian accused of violating an Army regulation. I

¹⁵ See *id.* at 4–39.

¹⁶ *Id.* at 38–39.

¹⁷ See *id.* at 2.

¹⁸ See discussion *infra* Part V.C.

¹⁹ See Trial Record, *supra* note 14, at 43–45.

²⁰ See *id.* at 45.

requested and was afforded an out-of-court hearing to lay the factual basis for my motion. The court closed for the out-of-court hearing at 11:30 a.m. on August 20, and the remainder of the day was consumed by the testimony of witnesses as well as oral argument relating to the jurisdictional issue.²¹ After a review of the authorities governing the question, we proceeded with testimony, stipulating that it would serve “the limited purpose of [adducing] jurisdictional facts.”²²

My first witness for this purpose was Mountz himself. Mountz testified about his occupation, his contract with Vinnell, and the manner in which he had performed his duties. He described how he had been paid, and identified Thomas Broady as the Vinnell project manager who had been his immediate superior. Mountz testified that, for his services by Vinnell, he had been paid with checks drawn on the Bank of America in Los Angeles and co-signed by Broady and David Kirk, the office manager from Vinnell. Mountz stated that he was neither a member of the U.S. Army nor employed by the U.S. Government in any capacity.²³

According to Mountz’s direct testimony at the jurisdiction hearing, there had been no armed conflict in Korea since his arrival. He was not required by the terms of his contract, or otherwise, to live in Army billets, to eat in an Army mess, or to use any specific Army facilities. He was authorized to use MPCs and had Post Exchange privileges. Mountz testified that he had last received a paycheck from Vinnell on June 30, 1958; that he had been relieved of all duties for Vinnell; and that he had been restricted to Camp Red Cloud for ten days in July and, since then, had been living in Seoul. His passport, confiscated by the Army investigator who had interviewed him, was at the time of the hearing in the possession of Kirk, the Vinnell office manager.²⁴

On cross-examination, the Government elicited from Mountz the information that he had been provided an equivalent government rating of GS-13, which had entitled him to Post Exchange privileges, government medical services, and government quarters if available. In response to the trial counsel’s inquires, Mountz testified that he had made use of the Post Exchange privilege card and the whiskey-ration card that had been issued to him at I Corps Headquarters; that he had lived in Army quarters at Camp Red Cloud during the past year; and that he had maintained a membership in the

²¹ See *id.* at 45–46; see also Transcript, Out-of-Court Hearing in the Case of George E. Mountz, United States Civilian Accompanying the Armed Forces (U.S. Army) in Korea, Uijongbu, Korea (Aug. 20, 1958), in Record, *supra* note 1, App. Ex. 12 [hereinafter Record App. Ex. 12].

²² Record App. Ex. 12, *supra* note 21, at 4.

²³ See *id.* at 4–8.

²⁴ See *id.*

Officers Club, where he had taken his meals from time to time. Also, he had been issued a government identification card that enabled him to utilize government facilities in other locations in Korea and received his mail through the Army post-office system.²⁵

Following cross-examination, the Law Officer asked the witness some questions of his own bearing on the issue of jurisdiction. In response to these questions, Mountz testified that he had not been required to register with the Korean authorities as an alien entering the country; that he had come from Japan on a military aircraft, which had landed at an Air Force installation; that he had not been subjected to a customs search by Korean authorities; that he had made his Post Exchange and other purchases on military bases with MPCs; and that he had enjoyed all of the privileges available to civil-service employees of the U.S. Army in Korea.²⁶

2. *The Legal Arguments*

a. *For the Defense*

Then, as now, the UCMJ provided for court-martial jurisdiction over “persons serving with, employed by, or accompanying the armed forces outside the United States.”²⁷ In arguing that it was constitutionally impermissible to subject Mountz to court-martial, I cited such hoary precedents as *Ex Parte Milligan*²⁸ and *Duncan v. Kahanamoku*²⁹ as well as *Ex Parte Henderson*,³⁰ an obscure circuit case that held unconstitutional a

²⁵ See *id.* at 8–14.

²⁶ See *id.* at 14–17.

²⁷ 10 U.S.C. § 802(a)(11) (2000). See generally Uniform Code of Military Justice, art. 2, available at <http://www.jag.navy.mil/documents/UCMJ.pdf>.

²⁸ *Ex parte Milligan*, 71 U.S. 2 (1866). In *Milligan*, the Court held, inter alia, that where “the [f]ederal authority [is] . . . unopposed” and the federal courts “open to hear criminal accusations and redress grievances[.] . . . no usage of war [can] sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service.” *Id.* at 121–22.

²⁹ *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). Immediately after the attack on Pearl Harbor, the Governor of Hawaii placed the territory under martial law, pursuant to Section 67 of the Hawaiian Organic Act, 31 Stat. 141, 153 (1900), and civilian courts and juries were replaced by military tribunals. See *id.* at 307–08. The Court, ordering the release of two Hawaiian men tried and convicted in such tribunals, held that the term “martial law,” though not expressly defined in the Act, was intended to empower the military to maintain “an orderly civil government” and to defend “against actual or threatened rebellion or invasion,” but “was not intended to authorize the supplanting of courts by military tribunals.” *Id.* at 324.

³⁰ *Ex parte Henderson*, 11 F. Cas. 1067 (C.C.D. Ky. 1878) (No. 6349).

congressional statute that purported to confer court-martial jurisdiction over contractors who defrauded the Army.³¹ But I principally relied on *Reid v. Covert*³² (*Reid II*), an opinion issued by the Supreme Court just one year earlier, to support my contention that the power conferred upon Congress by the Constitution to “make Rules for the Government and Regulation of the land and naval Forces”³³ simply did not allow for jurisdiction over civilians such as Mountz.

The *Reid II* opinion covered two different cases: *Reid v. Covert* and *Kinsella v. Krueger*.³⁴ The former involved Mrs. Clarice Covert, who had killed her husband, a sergeant in the U.S. Air Force, at a military base in England. She was tried by court-martial for murder and convicted despite her claim of insanity. Her sentence was affirmed by the board of review but reversed by the U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces) for errors pertaining to the insanity defense. While held in the United States pending retrial in the District of Columbia, she filed a habeas corpus petition challenging court-martial jurisdiction.³⁵ Relying on *United States ex rel. Toth v. Quarles*,³⁶ in which the Supreme Court held that a discharged serviceman who had returned to civilian life could not be subjected to trial by court-martial for offenses allegedly committed during his military service,³⁷ the district court granted the writ. The Government appealed directly to the Supreme Court.³⁸

The other case involved Mrs. Dorothy Smith, who had killed her husband, an Army officer, at an Army post in Japan where she had been living with him. She, too, had been tried for murder and convicted despite evidence of insanity. While she was serving a sentence of life imprisonment in a federal penitentiary in West Virginia, her father, Walter Krueger, filed a petition for habeas corpus on her behalf, but in her case the district court denied the writ. While an appeal was pending in the Fourth Circuit, the

³¹ See *id.* at 1078. While acknowledging that “[c]ourts-martial are lawful tribunals existing by the same authority [as] that [by which] other courts exist,” the court cautioned that the jurisdiction of military tribunals “is limited and special, being confined to military persons charged with military offenses.” *Id.* at 1068.

³² *Reid II*, 354 U.S. 1 (1957).

³³ U.S. CONST. art. I, § 8, cl. 14.

³⁴ See *Reid v. Covert (Reid I)*, 351 U.S. 487, 488 (1956); see also *United States ex rel. Krueger v. Kinsella*, 137 F. Supp. 806 (S.D. W. Va. 1956), *aff’d*, *Kinsella v. Krueger*, 351 U.S. 470, 487 (1956), *rev’d on reh’g sub nom Reid II*, 354 U.S. 1.

³⁵ See *Reid I*, 351 U.S. at 488.

³⁶ *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

³⁷ See *id.* at 14–15.

³⁸ See *Reid I*, 351 U.S. at 488; see also *Reid II*, 354 U.S. at 4.

Supreme Court granted certiorari at the Government's request and consolidated the two cases for argument.³⁹

In the first of a pair of decisions in the case, the Court found that the provisions of Article III and of the Sixth and Seventh Amendments, requiring trial by jury after indictment by grand jury, did not protect American citizens tried by the Government in foreign countries.⁴⁰ The majority did not find it necessary to pass on the constitutional provision governing the power of Congress to make rules governing the Armed Forces.⁴¹ After granting a rehearing,⁴² however, the Court heard additional arguments and withdrew the previous opinions. The Court held in its new opinion "that Mrs. Smith and Mrs. Covert could not constitutionally be tried by military authorities."⁴³

Undertaking an exhaustive historical examination, the Court rejected the notion that the Constitution never could be applied to protect U.S. citizens abroad. The Court, holding "that the Constitution in its entirety applied to the trials of Mrs. Smith and Mrs. Covert," concluded that "their court-martial[s] did not meet the requirements of Art. III, § 2 or the Fifth and Sixth Amendments."⁴⁴ Accordingly, the Court undertook to divine whether "anything *within* the Constitution . . . authorizes the military trial of dependents accompanying the armed forces overseas."⁴⁵

The Court found no such authorization in the empowerment of Congress to make rules governing the military forces. The Court

recognize[d] that there might be circumstances where a person could be "in" the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform. But the wives, children and other dependents of servicemen cannot be placed in that category, even though they may be accompanying a serviceman abroad at Government expense and receiving other benefits from the Government. We have no difficulty in saying that such persons do not lose their civilian status and their right to a civilian trial because the Government helps them live as members of a soldier's family.⁴⁶

The Court also recognized the possibility of court-martial jurisdiction over civilians in battlefield areas:

³⁹ See *Kinsella*, 351 U.S. at 471-73; see also *Reid II*, 354 U.S. at 5.

⁴⁰ See *Kinsella*, 351 U.S. at 476, 478-79.

⁴¹ See *id.* at 476.

⁴² *Reid v. Covert*, 352 U.S. 901 (1956).

⁴³ *Reid II*, 354 U.S. at 5.

⁴⁴ *Id.* at 18-19.

⁴⁵ *Id.* at 19.

⁴⁶ *Id.* at 22-23 (footnote omitted).

There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces “in the field” during *time of war*. To the extent that these cases can be justified, insofar as they involved trial of persons who were not “members” of the armed forces, they must rest on the Government’s “war powers.” In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefield.⁴⁷

Specifically rejected, however, was the Government’s contention that civilians “in the field” should include dependents of military personnel accompanying them overseas in times of “world tension.”⁴⁸ The plurality opinion, observing that “[c]ourts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates” and that courts-martial “have always been subject to varying degrees of command influence,” concluded with these interesting words from Lord Coke: “Shall the Souldier and Justice Sit on one Bench, the Trumpet will not let the Cryer speak in Westminster-Hall.”⁴⁹

While only four justices concurred in the plurality opinion, and the two separate concurring opinions restricted the holding to the circumstances of the cases sub judice,⁵⁰ I nonetheless believed that the handwriting was on the wall. Accordingly, in defending Mountz I argued strongly that in the context of rights afforded to individuals accompanying military personnel overseas, there is no difference between capital and noncapital cases and certainly no difference between civilian dependents and civilian employees of contractors. Indeed, dependents have a stronger connection to the military, by reason of the extensive benefits provided to them by the Government. I also argued that Mountz was no longer an employee of Vinnell at the time of his trial—as he had come to the end of his one-year contract in any event—and, therefore, could not be considered as “accompanying” the Army, but for the detention of his passport.

⁴⁷ *Id.* at 33 (footnote omitted).

⁴⁸ *Id.* at 34.

⁴⁹ *Reid II*, 354 U.S. at 36, 41 (internal quotation marks and emphasis omitted).

⁵⁰ *See id.* at 49 (Frankfurter, J., concurring) (“I therefore conclude that, in capital cases, the exercise of court-martial jurisdiction over civilian dependents in time of peace cannot be justified”); *see also id.* at 65 (Harlan, J., concurring) (“I concur in the result, on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace.” (footnote omitted)). Two justices dissented and one declined to participate. *See id.* at 41 (noting that Whittaker, J., “took no part in the consideration or decision of these cases”); *id.* at 78 (Clark & Burton, J.J., dissenting).

b. *For the Prosecution*

My adversary, of course, argued that the *Reid* case called into question the constitutionality of the UCMJ jurisdictional provision only to the extent that it pertained to civilian dependents who accompany military personnel beyond the territorial limits of the United States in time of peace. That indeed was the interpretation given to *Reid* by the Court of Military Appeals in *United States v. Wilson*,⁵¹ a decision issued on March 28, 1958, within one year of the Supreme Court's decision in *Reid*.

In *Wilson*, the highest military court was confronted with the conviction by court-martial, for various sex crimes violative of the UCMJ, of a civilian employee of the Army Comptroller in Berlin. The jurisdictional question was resolved in favor of the Government by an expedient: The court simply drew a distinction between overseas employees of the government and overseas dependents of military personnel. As to the former, the Court of Military Appeals wrote:

They both live and work in a military community. They are required for, and are depended upon to carry out, the assigned missions of the military forces overseas. Functionally, as well as practically, they are either "part of the armed forces" or "so directly connected with such forces" as to be inseparable from them for the purpose of observing the standards of conduct prescribed by Congress for the government of the military.⁵²

The court also rejected Wilson's contention that his tender of resignation from his employment the day before trial deprived the court-martial of jurisdiction. In this regard, the court held: "[c]harges had been served and the Article 32 pretrial investigation had been conducted almost two months earlier. Manifestly, jurisdiction over him had attached long before the tender, and the proceedings could, therefore, continue to completion."⁵³

My adversary also relied on earlier opinions of the Court of Military Appeals sustaining court-martial jurisdiction: *United States v. Marker*, the case of a civilian employee of the Tokyo Ordnance Depot;⁵⁴ *United States v. Robertson*, the case of a merchant seaman who was a member of the crew of a private vessel chartered to the Military Sea Transportation Service, wherein the court held that the Japan SOFA's provision of jurisdiction in the Japanese courts did not preclude concurrent jurisdiction in courts-martial;⁵⁵ and *United*

⁵¹ *United States v. Wilson*, 25 C.M.R. 322 (C.M.A. 1958).

⁵² *Id.* at 324 (footnotes omitted).

⁵³ *Id.*

⁵⁴ *United States v. Marker*, 3 C.M.R. 127 (C.M.A. 1952).

⁵⁵ *United States v. Robertson*, 19 C.M.R. 102 (C.M.A. 1955).

States v. Rubenstein, the case of a man who was originally employed by the Army as a clerk-typist in Japan, who became the manager of a club operated for the benefit of Air Force civilian employees under a contract by which he would retain military privileges and remain subject to military jurisdiction, and who fled to the United States while under suspicion of black-market activities and voluntarily came to Korea, where he was apprehended and returned to Japan for a trial by court-martial.⁵⁶ Finally, Captain West cited as good law a Court of Military Appeals opinion that I contended had been overruled by *Reid*: *United States v. Burney*,⁵⁷ a case involving a situation on all fours with the case at bar. In *Burney*, jurisdiction was upheld in the case of a civilian employee of the Philco Corporation who had been assigned to maintain technical equipment at an Air Force base in Japan.⁵⁸

On the question of the loss of jurisdiction by severance of any connection with the Armed Forces prior to trial, my adversary argued that another pre-*Reid* decision that I had cited, *United States v. Schultz*,⁵⁹ presented a case distinguishable from the one at bar. *Schultz* involved a former Air Force Captain who was separated from service in Japan and issued a commercial entry permit to remain in the country. The high military court held that he had severed all connection with the military, had been allowed to “merge” with the civilian population, and, therefore, was not amenable to trial by court-martial for the offense of manslaughter committed during his military service.⁶⁰

Captain West contended that whereas *Schultz* had merged into the civilian population, *Mountz* had not. My adversary noted that *Mountz* had maintained all of his prior Army privileges—including the use of his quarters, the Post Exchange, his whiskey-ration card, Army post-office facilities, and MPCs. It seemed to me, however, that *Mountz*—in the absence of employment by the government or by Vinnell, and without any military status of any kind—had “merged” into the civilian population just as effectively as had *Schultz*. Moreover, only the illegal confiscation of *Mountz*’s passport prevented him from leaving the country during trial.

3. The Ruling

Before he ruled on the question of jurisdiction, the Law Officer called Mr. Broady, the Vinnell project manager, to the witness stand. Broady was

⁵⁶ *United States v. Rubenstein*, 22 C.M.R. 313 (C.M.A. 1957).

⁵⁷ *United States v. Burney*, 21 C.M.R. 98 (C.M.A. 1956).

⁵⁸ *See id.* at 103–04, 125.

⁵⁹ *United States v. Schultz*, 4 C.M.R. 104 (C.M.A. 1952).

⁶⁰ *Id.* at 110–11.

questioned extensively by the Law Officer, and also by counsel, regarding the work that Mountz had performed, how he had performed it, and the military facilities that had been available to him.⁶¹

I then recalled Mountz to the stand in an effort to show his disconnect from the military after the termination of his employment, including his use of a private residence in Seoul that he had maintained even prior to the termination of his contract. Mountz's testimony at this point revealed his restricted activities between July 8th and 12th.⁶²

The Law Officer pronounced himself satisfied with the whereabouts of Mountz between those dates, which was when the charges were served upon him.⁶³ The Law Officer then denied the motion challenging jurisdiction over the accused at the time of the alleged offenses.⁶⁴ He deferred ruling on the question of the present jurisdiction of the court-martial over Mountz—calling it “a rather novel point”—and directed further briefing.⁶⁵ When counsel advised that they could provide no additional authorities, however, the Law Officer denied the motion challenging present jurisdiction.⁶⁶

The out-of-court hearing on the jurisdictional issues concluded with the Law Officer taking judicial notice

to the effect that there [was] no agreement or treaty between the United States and the Republic of Korea conferring upon the Republic of Korea jurisdiction over the military, the members of the United States military establishment or civilians serving with the military or accompanying the United States military establishment while stationed in Korea.⁶⁷

This, of course, was in stark contrast to the situation in Japan, where I had helped to administer a SOFA that, among other things, provided for such jurisdiction.

⁶¹ See Record App. Ex. 12, *supra* note 21, at 28–33.

⁶² See *id.* at 33–38.

⁶³ See *id.* at 38.

⁶⁴ See *id.* at 40.

⁶⁵ *Id.*

⁶⁶ See *id.* at 41.

⁶⁷ Record App. Ex. 12, *supra* note 21, at 42.

C. A Question of Regulation

Mountz was charged with violating an Army regulation—a “Circular” designated 756-1 (Circular 756-1 or the Regulation).⁶⁸ With respect to all persons in the command, the Regulation prohibited, *inter alia*:

a. The transfer of a restricted item or dollar instrument to other than an authorized person, or transferring said item or instruments to authorized person(s) having knowledge or having reasonable cause to believe that they will be transferred directly or indirectly to other than authorized person(s).

...

c. Acquiring Korean currency from other than United States Finance Disbursing Officers, their agents, or other authorized sources.

d. Transportation of dollar instruments and restricted items[, including:]

(1) Transporting or causing to be transported restricted items or dollar instruments knowing or having reasonable cause to believe that such items or instruments will be transferred directly or indirectly to other than authorized person(s).⁶⁹

The Regulation was promulgated on August 21, 1956 (and was amended in respects not pertinent to the case on June 27, 1957).⁷⁰ On June 30, 1957, a Circular designated 310-1 (Circular 310-1) was promulgated by Headquarters, U.S. Army Forces, Far East and Eighth U.S. Army (REAR)—the same authority that had promulgated Circular 756-1.⁷¹ Circular 310-1 provided as follows: “Publications bearing a date prior to 1 July 1957 and not listed in this index are obsolete and herewith rescinded.”⁷² Although a Circular designated 756-1, but entitled “Operation of Quartermaster Sales Outlets for Petroleum Products” and dated September 7, 1955, was listed in

⁶⁸ See Headquarters I Corps (Group), APO 358, United States Army, General Court Martial Order No. 27 1 (Oct. 3, 1958), *in Record*, *supra* note 1 [hereinafter Court Martial Order].

⁶⁹ Headquarters United States Army Forces, Far East and Eighth United States Army, APO 301, Circular No. 756-1 § (4)(a), (c)–(d) (Aug. 21, 1956), *in Record*, *supra* note 1, Prosecution Ex. 1 [hereinafter Circular 756-1].

⁷⁰ See Headquarters I Corps (Group), APO 358, Review of the Staff Judge Advocate 2 para. 4(b)(1) (Oct. 2, 1958), *in Record*, *supra* note 1 [hereinafter SJA Review].

⁷¹ Headquarters United States Army Forces, Far East and Eighth United States Army (REAR), APO 343, Circular No. 310-1 (June 30, 1957), *in Record*, *supra* note 1, Defense Ex. B [hereinafter Circular 310-1].

⁷² *Id.*

the 30 June 1957—dated index of 8th Army publications, the at-issue Circular 756-1 (i.e., the one dated August 21, 1956, and pertaining to prohibited transactions) was not listed.⁷³ My contention simply was this: The Circular under which Mountz was charged—that is, the Regulation—had been repealed (albeit probably inadvertently) and was no longer operative at the time of Mountz's alleged offense.⁷⁴

Despite the foregoing, the Law Officer accepted my colleague's contention that the Regulation was still in effect. In denying my motion to dismiss and, thus, my contention that the Regulation was defunct,⁷⁵ the Law Officer relied upon General Order 76, issued by the same Headquarters that had issued the previously described Circulars.⁷⁶ Paragraph VI of General Order 76 was dated June 21, 1957, a date prior to the date of the repealing Circular. Paragraph VI provided that certain directives were to remain in effect until "specifically superseded or rescinded."⁷⁷ Since Circular 756-1 had not been rescinded specifically, the Law Officer held that Circular 310-1 fell "short of the specific supersession or rescission needed under the provisions of Section VI of General Order 76."⁷⁸ The Law Officer also noted that Circular 756-1 "ha[d] no date of automatic expiration or rescission as [was] frequently found in directives of this command."⁷⁹ The Law Officer's ruling was made in an out-of-court hearing on the second day of trial.⁸⁰

⁷³ See *id.*

⁷⁴ See Record App. Ex. 12, *supra* note 21, at 43–44; see also Transcript, Out-of-Court Hearing in the Case of George E. Mountz, United States Civilian Accompanying the Armed Forces (U.S. Army) in Korea, Uijongbu, Korea 1–2 (Aug. 20, 1958), in Record, *supra* note 1, App. Ex. 18 [hereinafter Record App. Ex. 18].

⁷⁵ See Headquarters I Corps (Group), Office of the Staff Judge Advocate, APO 358, United States Army, Request for Termination of Restriction of George E. Mountz and Dismissal of the Charges Against Him 1–2 (July 22, 1958), in Record, *supra* note 1, App. Ex. 14.

⁷⁶ See Headquarters, United States Army Forces, Far East and Eighth United States Army (REAR), APO 343, General Order No. 76 (June 21, 1957), in Record, *supra* note 1, Defense Ex. C [hereinafter General Order 76]; see also Record App. Ex. 18, *supra* note 74, at 1.

⁷⁷ General Order 76, *supra* note 76, at § VI; see Record App. Ex. 18, *supra* note 74, at 1–2.

⁷⁸ Record App. Ex. 18, *supra* note 74, at 1; see also General Order 76, *supra* note 76, at § VI.

⁷⁹ Record App. Ex. 18, *supra* note 74, at 1.

⁸⁰ See *id.*

D. Trial, Verdict, and Sentence

For the prosecution, the court-martial heard testimony from Messrs. Broady and Kirk, the Vinnell project manager and office manager, respectively. They once again described the Vinnell operations and payroll procedures. They also described the part that Mountz had played in cashing the Vinnell checks.⁸¹ The court-martial also heard the testimony of Akiyoshi Kazama, an enlisted soldier who acted as a cashier in the Disbursing Office at Camp Red Cloud. He identified certain currency-exchange records and testified to cashing one of the Vinnell checks presented by Mountz and exchanging MPCs for the checks, which were written in dollar amounts.⁸² Another enlisted soldier who acted as a cashier in the Disbursing Office, Kenneth D. Estes, testified to his exchange of MPCs for the second Vinnell check presented by Mountz, and described the records made of that transaction.⁸³

The next witness to testify for the prosecution was John W. Crawford, Chief Clerk and First Sergeant at the Disbursing Office. Although he had no connection with the accused, he identified the checks that Mountz had presented, and identified Lieutenant Allen as the officer who had approved the cashing of the checks at the Finance Office. This was the same Lieutenant Allen originally charged along with another officer and Mountz for the currency violations.⁸⁴ The final witness for the prosecution was Elmer E. Snyder, a criminal investigator in the Military Police assigned to the Office of the Provost Marshal of I Corps. Snyder testified to the taking of a purportedly incriminating statement made by Mountz that was introduced into evidence.⁸⁵ Snyder was subjected to extensive cross-examination, as he appeared to have little understanding of the currency regulation that Mountz was suspected of violating. In addition, the Law Officer examined Snyder concerning his understanding of the crime that he was supposed to be investigating. In the end, the Mountz "confession" was received in evidence.⁸⁶

I later recalled Snyder to the stand for the defense's case and drew from him the admission that Mountz did not consent to the confiscation of his

⁸¹ See Trial Record at 50–75.

⁸² See *id.* at 75–81.

⁸³ See *id.* at 81–84.

⁸⁴ See *id.* at 84–87; see also Charge Sheet, *supra* note 13, at 1.

⁸⁵ See Trial Record, *supra* note 14, at 87–103; see also Statement of Mountz, George E. (July 11, 1958), in Record, *supra* note 1, Prosecution Ex. 7 [hereinafter Record Prosecution Ex. 7].

⁸⁶ See Trial Record, *supra* note 14, at 107–08; see also Record Prosecution Ex. 7, *supra* note 85.

briefcase or the removal of his passport therefrom. Snyder also testified that he had turned the passport over to Broady on instructions from Snyder's superior officer. I also put on the record a stipulation that Broady had been holding the passport since July 15, 1958.⁸⁷ That military authorities had expropriated the passport of an American civilian had bothered me since the inception of the case.

My only other witness was Chief Warrant Officer McSween, another criminal investigator in the Office of the Provost Marshal. Through him, I gained the admission of an exculpatory statement that Mountz had made and that Mountz and McSween both had signed.⁸⁸

Exhibits received in evidence during the course of the trial included the regulations at issue, the Vinnell checks, the financial records of the Disbursing Office, a laminated card used by Snyder in reading Mountz his Article 31 (i.e., Miranda) rights, and the two statements given by Mountz to the criminal investigators.

After extensive summation by counsel, the Law Officer instructed the jury.⁸⁹ Although he had ruled in an out-of-court hearing that Circular 756-1 was in effect at the time of Mountz's alleged offenses, the Law Officer placed before the jury the question of the continuing validity of the Circular.⁹⁰ The Law Officer refused, however, to place the question of jurisdiction before the jury.⁹¹ Nevertheless, at the conclusion of the instructions, the president of the court-martial asked the Law Officer the following question: "Are civilians who are employed by the Army, GS civilians, civil service workers, let's say, are they subject to the same privileges and penalties as members of the Armed Forces while serving in overseas theaters[?]"⁹² The Law Officer responded: "This accused, although not within the capacity you mentioned, is subject to military rules, laws, and [the] regulations of this [court-martial] while in [the Korean] theater."⁹³

A verdict of guilty was announced by the president approximately two-and-three-quarter hours later.⁹⁴ After a brief presentation of Mountz's personal data by the prosecution, and an argument by me urging a light sentence, the Law Officer gave a brief charge on the duties of the court-martial in respect to sentencing. After some inquiries by members of the

⁸⁷ See Trial Record, *supra* note 14, at 115-17.

⁸⁸ See *id.* at 117-19.

⁸⁹ See *id.* at 131-39.

⁹⁰ See *id.* at 134-35.

⁹¹ See *id.* at 140.

⁹² *Id.* at 139.

⁹³ Trial Record, *supra* note 14, at 140.

⁹⁴ *Id.* at 140-41.

court-martial to clarify the instructions, particularly on the question of a fine, the members retired to consider a sentence. About one half hour elapsed before they returned with the sentence—a fine of \$1,500.00.⁹⁵ While I considered this something of a victory, I continued to maintain that there was no jurisdiction over Mountz and no extant regulation for him to have violated through his at-issue conduct.

VI. POST-TRIAL REVIEW AND VINDICATION

Although I was certain that my legal arguments would prevail once they got to an Army board of review (the intermediate appellate court) in Washington, D.C., vindication came even sooner than expected. By the time that Colonel Booth—the I Corps Judge Advocate—got around to filing his review on October 2, 1958, I had been reassigned to the Office of the Staff Judge Advocate, Headquarters, 1st U.S. Army, Governors Island, New York. This was a great assignment—it was close to home and presented many opportunities for trial experience. Mountz had already gone home to California when I received at Governors Island the news that Colonel Booth had recommended to the Commanding General that Mountz's sentence be "disapproved" (i.e., reversed). Colonel Booth wrote: "The [C]ircular prohibiting Hwan transactions of the type charged was rescinded before Mountz committed the acts alleged. Accordingly, his conviction cannot be sustained."⁹⁶

Colonel Booth's review included a scholarly analysis of the law governing the compilation and rescission of laws and statutes, as applied to Army regulations. Colonel Booth wrote the following:

When a group of laws or statutes are codified or collected in a compilation, all provisions of the former laws or statutes mentioned or retained in the new code or compilation are regarded as having been continued in full force and effect. On the other hand, when a statute is omitted from a new code or compilation, such omitted law is considered to be repealed or annulled when the new compilation expressly states that all statutes not included are repealed and that the listing in the new code or compilation covers the entire statutory law. When the legislature provides that a code or compilation of laws shall constitute the entire statutory law, all prior acts which are omitted from the code or compilation are repealed. It follows then, that AFPE/8A Circular 756-1, dated 21 August 1956, which was omitted from the compilation of directives and circulars promulgated in Circular Number

⁹⁵ *Id.* at 147.

⁹⁶ SJA Review, *supra* note 70, at 5.

310-1 on 30 June 1957, was legally and effectively rescinded on that date and was thereafter of no force or effect.⁹⁷

He then reviewed whether a Circular designated 310-1 and dated November 30, 1957, which listed a "756-1 Unauthorized Transaction Circular" as being then in effect, served to revive and again make effective the Regulation.⁹⁸ This was a point not even seized upon by the prosecution during the trial. The Staff Judge Advocate disposed of it as follows:

Normally, revocation or rescission of a regulation, by which a preceding regulation was revoked, will not revive the original regulation unless it is specifically provided that such a revival was intended. A special statute may provide that a prior general statute, which repealed another prior special statute, is repealed and the prior special statute is specifically revived. However, where one statute has been repealed by a failure to include it in a compilation covering the existing statutory law, such a statute cannot be revived by construction. The act of a clerical revisor or codifier in including in a codification or compilation, a statute which has been repealed, does not operate to revitalize it. This especially is true when a repealed statute appears in a compilation which does not specifically revive it, but is a mere compilation or republication of existing statutes. A FORTIORI, the mere listing of the rescinded Circular Nr. 756-1, dated 21 August 1956, in an index of publications promulgated by Eighth United States Army on 30 November 1957, did not have the legal effect of reviving or revitalizing the rescinded circular.⁹⁹

Colonel Booth noted in his review that a new U.S. 8th Army Circular dealing with Hwan transactions in the black market was in the process of preparation, and concluded with this apologia for his original advice that the case be referred to trial:

The pretrial advice in this case was prepared on the assumption that the AFFE/8A Circular Mountz was accused of violating was then in effect, and had been in effect at the time of acts alleged in the specifications. This assumption was buttressed by the fact of the circular's listing in the 30 November 1957 Index of Eighth Army Publications then in effect. Advice from Eighth Army Headquarters also indicated that the circular in question controlled black market activities in Korea. The rescinding circular was first brought to light in the course of Mountz' trial.¹⁰⁰

⁹⁷ *Id.* at 4 (citations omitted).

⁹⁸ *See id.*

⁹⁹ *Id.* at 4-5 (citations omitted).

¹⁰⁰ *Id.* at 5.

On the basis of the advice of the Staff Judge Advocate, Lieutenant General Trapnell, Commander of I Corps, issued the following Order: "In the . . . case of George E. Mountz, . . . United States Civilian Accompanying the Armed Forces (U.S. Army) in Korea, the sentence is disapproved and the charges are dismissed."¹⁰¹

VII. EPILOGUE

A. *The Supreme Court Speaks*

On January 18, 1960, approximately one-and-a-half years after the Mountz case was concluded, the Supreme Court issued two opinions that finally put to rest the question of court-martial jurisdiction over civilians accompanying the Armed Forces. In *Kinsella v. United States ex rel. Singleton*,¹⁰² the wife of a soldier assigned to a tank battalion in Baumholder, Germany, was charged, along with her husband, with the unpremeditated murder of one of their children.¹⁰³ Both parents offered to plead guilty to involuntary manslaughter, and new charges were lodged for trial before a general court-martial. The wife challenged the jurisdiction of the court-martial and pled guilty when the challenge was rejected. Her conviction was upheld by the Court of Military Appeals, and she was confined to the federal reformatory at Alderson, West Virginia, to serve her sentence. Thereafter, a writ of habeas corpus was issued, resulting in her being discharged from custody. The warden's appeal from the grant of the writ came before the Supreme Court on a petition for certiorari.¹⁰⁴

Referring to *Reid II*,¹⁰⁵ the Court noted that the jurisdictional test was "one of *status*, namely, whether the accused in the court-martial proceeding [was] a person who [could] be regarded as falling within the term 'land and naval Forces.'"¹⁰⁶ The Court noted that "each opinion supporting the judgment struck down the [jurisdictional] article as it was applied to civilian dependents charged with capital crimes."¹⁰⁷ Although the concurring Justices in *Reid II* had supported the judgment because the crime was punishable by death,¹⁰⁸ the Court observed that "[t]he Justices joining in the opinion

¹⁰¹ Court-Martial Order, *supra* note 68, at 2.

¹⁰² *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

¹⁰³ *Id.* at 235–36.

¹⁰⁴ *Id.* at 236.

¹⁰⁵ *Reid II*, 354 U.S. 1 (1957).

¹⁰⁶ *Kinsella*, 361 U.S. at 241.

¹⁰⁷ *Id.*

¹⁰⁸ See *supra* note 49 and accompanying text.

announcing the judgment . . . did not join in this view, but held that the constitutional safeguards claimed applied in 'all criminal trials' in Article III courts and applied outside of the States."¹⁰⁹

The *Kinsella* Court adopted this view and rejected the Government's contention that courts-martial would have jurisdiction over civilian dependents charged with noncapital offenses.¹¹⁰ With respect to the Government's claim that discipline in the military service would be critically impacted by not allowing jurisdiction in noncapital cases, the Court stated that it had

heard no claim that the total failure to prosecute capital cases against civilian dependents since the [*Reid II*] decision in 1957 had affected in the least the discipline at armed services installations. We do know that in one case, *Wilson v. Girard*, . . . the Government insisted and we agreed that it had the power to turn over an American soldier to Japanese civil authorities for trial for an offense committed while on duty. We have no information as to the impact of that trial on civilian dependents. Strangely, this itself might prove to be quite an effective deterrent. Moreover, the immediate return to the United States permanently of such civilian dependents, or their subsequent prosecution in the United States for the more serious offenses when authorized by the Congress, might well be the answer to the disciplinary problem. Certainly such trials would not involve as much expense nor be as difficult of successful prosecution as capital offenses.¹¹¹

The "Girard" mentioned in the foregoing was the same Girard referred to earlier in the discussion of my work at the U.S. Army Claim Service, Far East, in Japan.¹¹²

The Court saw no harm to our relationship with other countries in excluding noncapital cases, along with capital cases, from court-martial jurisdiction. The Court, rejecting the assertion that the Necessary and Proper Clause presented a basis for including civilian dependents within the term "land and naval forces," observed that this very notion had been rejected in the *Reid* case.¹¹³ The Court concluded its opinion by holding that the dependent wife was "protected by the specific provisions of Article III and the Fifth and Sixth Amendments and that her prosecution and conviction by court-martial [were] not constitutionally permissible."¹¹⁴

¹⁰⁹ *Kinsella*, 361 U.S. at 241 (internal quotation marks omitted).

¹¹⁰ *See id.* at 238-48.

¹¹¹ *Id.* at 245-46.

¹¹² *See supra* notes 6-8 and accompanying text.

¹¹³ *Kinsella*, 361 U.S. at 247-48.

¹¹⁴ *Id.* at 249.

In *Grisham v. Hagan*,¹¹⁵ decided the same day as *Kinsella*, the Court was confronted with the case of a civilian employee of the U.S. Army who worked at an Army installation in France. Tried by general court-martial for the capital offense of premeditated murder as defined in the UCMJ, the employee, Albert Grisham, was found guilty of the offense of unpremeditated murder and sentenced to a term of life imprisonment.¹¹⁶ While serving that sentence at the U.S. penitentiary in Lewisburg, Pennsylvania, he applied for a writ of habeas corpus. His claim was "that Article 2(11) was unconstitutional as applied to him, for the reason that Congress lacked the power to deprive him of a civil trial affording all of the protections of Article III and the Fifth and Sixth Amendments."¹¹⁷

Grisham's petition was dismissed in the district court, and that ruling was affirmed in the court of appeals.¹¹⁸ The Supreme Court reversed, holding as follows:

We are of the opinion that this case is controlled by *Reid v. Covert*. . . . It decided that the application of the [jurisdictional article] to civilian dependents charged with capital offenses while accompanying servicemen outside the United States was unconstitutional as violative of Article III and the Fifth and Sixth Amendments. We have carefully considered the Government's position as to the distinctions between civilian dependents and civilian employees, especially its voluminous historical materials relating to court-martial jurisdiction. However, the considerations pointed out in *Covert* have equal applicability here. . . . For the purposes of this decision, we cannot say that there are any valid distinctions between the two classes of persons. The judgment is therefore reversed.¹¹⁹

The *Grisham* and *Kinsella* cases sounded the death knell of court-martial jurisdiction over civilians accompanying the Armed Forces overseas in nonbattle areas in peacetime. It should have been apparent to the military lawyers and military courts that this result was inevitable. It certainly was apparent to the young JAGC officer who defended George Mountz in Korea in 1958.

¹¹⁵ *Grisham v. Hagan*, 361 U.S. 278 (1960).

¹¹⁶ *Id.* at 279.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 280.

B. Congress Responds

Since 1957, Congress has given extraterritorial effect to certain specific provisions of the U.S. Code, thereby conferring jurisdiction on federal courts over U.S. civilians for certain specific types of misconduct overseas.¹²⁰ Nonetheless, until recently, jurisdiction was lacking over the vast majority of crimes that might be committed by civilians accompanying the Armed Forces in foreign lands.¹²¹

Noteworthy in this respect are the opinions of two appellate courts, each holding that overseas military bases, including leased houses and property, are included in the “special maritime and territorial jurisdiction of the United States”¹²² and that civilians who commit federal offenses within that jurisdiction are amenable to prosecution in federal court.¹²³ Holding to the contrary, however, another court of appeals—my own, in fact—held that the federal courts had no jurisdiction to prosecute a crime that took place on property leased by the United States for military use in the Federal Republic of Germany.¹²⁴ The panel identified a “jurisdictional gap” and directed that a copy of its opinion be forwarded to Congress.¹²⁵

Congress reacted by passing the Military Extraterritorial Jurisdiction Act of 2000 (the Act), which was signed into law on November 22, 2000.¹²⁶ The Act confers on Article III courts jurisdiction that, because of the constitutional constraints identified by the Supreme Court, could not be conferred upon courts-martial.¹²⁷ The Act provides for jurisdiction over civilians employed by, or accompanying, the Armed Forces overseas and over former members of the armed services who were separated from active duty and who attained civilian status without being prosecuted for offenses committed while on active duty and subject to court-martial.¹²⁸ The Act is limited to offenses punishable by imprisonment for more than one year.¹²⁹

¹²⁰ See Yost & Anderson, *supra* note 4, at 448.

¹²¹ See *id.* & nn. 15–16.

¹²² 18 U.S.C. § 7(3) (2000).

¹²³ See *United States v. Corey*, 232 F.3d 1166, 1171 (9th Cir. 2000); *United States v. Erdos*, 474 F.2d 157, 160 (4th Cir. 1973); see also *United States v. Wilson*, 25 C.M.R. 322, 324 (1958).

¹²⁴ See *United States v. Gatlin*, 216 F.3d 207, 209 (2d Cir. 2000).

¹²⁵ See *id.* at 223.

¹²⁶ Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified at 18 U.S.C. §§ 3261–1367 (2000)) [hereinafter the Act].

¹²⁷ See 18 U.S.C. § 3261(a) (2000).

¹²⁸ See *id.*

¹²⁹ *Id.*

Persons “employed by the Armed Forces outside the United States” are defined to include U.S. Department of Defense (DOD) contractors as well as civilian employees of the DOD who are not nationals or ordinarily residents of the host nation.¹³⁰ The class of “persons accompanying the Armed Forces” includes dependents of members of the military, of civilian DOD employees, and of contractors; however, the dependent must reside with the member employee or contractor and cannot be a national of, or ordinarily a resident in, the host country.¹³¹

The Act itself makes no provision for venue, leaving in place the general venue provision for “[o]ffenses not committed in any district.”¹³² That provision allows for venue “in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought.”¹³³ In the case of offenders not arrested or brought into any district, an information or indictment “may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders.”¹³⁴ If the last residence is unknown, the information or indictment may be filed in the District of Columbia, which will then be the venue for prosecution in the district court.¹³⁵

A person subject to the Act may be delivered for prosecution to the authorities of the host country, provided that such authorities request delivery of the person and provided that such procedure is authorized by treaty or international agreement.¹³⁶ As noted above, the United States is party to over 100 SOFAs governing our military forces in foreign countries.¹³⁷ Any of those countries may exercise its right to try persons accompanying the military, just as it may exercise its right to try members of the military as provided in the respective agreement, as did Japan in Girard’s case.¹³⁸

The Act provides that the removal to the United States of a person arrested overseas must be authorized by a federal magistrate judge.¹³⁹ Initial proceedings are also conducted before a magistrate judge. At the initial proceedings, the magistrate must determine whether there is probable cause to believe that an offense prosecutable under the Act has been committed and

¹³⁰ See 18 U.S.C. § 3267(1) (2000).

¹³¹ See *id.*

¹³² See 18 U.S.C. § 3238 (2000).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See 18 U.S.C. § 3263(a) (2000).

¹³⁷ See Eichelman, *supra* note 4, at 23 n.4; Yost & Anderson, *supra* note 4, at 451.

¹³⁸ See *supra* note 7 and accompanying text.

¹³⁹ See 18 U.S.C. § 3264(b) (2000).

that the person arrested has committed that offense.¹⁴⁰ Conditions of release or detention must be determined,¹⁴¹ and the initial proceedings “may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the [accused].”¹⁴² The magistrate judge is authorized to appoint a judge advocate—“certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member”¹⁴³—to represent the person accused in the initial proceedings. The Act provides for the Secretary of Defense, in consultation with the Secretary of State and the U.S. Attorney General, to prescribe appropriate regulations respecting the implementation of the Act.¹⁴⁴

The Act, which has filled the void that has existed since the trial of George Mountz, has already been invoked in the case of the wife of an Air Force Staff Sergeant who was accused of murdering the sergeant in Turkey.¹⁴⁵ Trial has been scheduled in federal court in Los Angeles.¹⁴⁶ The most important benefit of the Act, of course, is that it provides for the eventual trial of the accused offender in a United States District Court, with all the rights and privileges attendant thereto. George Mountz would have been tried by a jury of his peers rather than by a panel of military officers.

C. *Issues Remaining*

Despite the beneficial purposes served by the Act, however, some vexing issues remain. For one thing, the Act does not cover nonfelony offenses. For another, it does not apply to contractors, or their employees, hired by agencies other than the DOD. It is well known that civilians in the employ of firms under contract to the Central Intelligence Agency accompany the Armed Forces abroad and have even engaged in armed conflict. News stories abound, for example, regarding the use of such “operatives” accompanying the Armed Forces during the United States’ invasion of Afghanistan.¹⁴⁷

Reportedly, employees of CACI International Inc. of Arlington, Virginia, a company said to be under a contract managed by the U.S. Department of

¹⁴⁰ See 18 U.S.C. § 3265(a)(1)–(2) (2000).

¹⁴¹ See *id.* at § 3265(a)(3).

¹⁴² *Id.* at § 3265(a)(1)(B).

¹⁴³ *Id.* at § 3265(c)(1), (c)(2)(B).

¹⁴⁴ See 18 U.S.C. § 3266(a)–(b) (2000).

¹⁴⁵ Adam Liptak, *Who Would Try Civilians From U.S.? No One in Iraq*, N.Y. TIMES, May 26, 2004, at A11.

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., Frederick W. Kagan, *Did We Fail in Afghanistan?*, COMMENT., Mar. 2003, at 39–45.

the Interior, were allegedly responsible for the abuse of prisoners at the Abu Ghraib prison in Iraq.¹⁴⁸ If no DOD contractor were involved in those abuses, however, then it would seem that those contract employees who were responsible are not subject to the Act.

Apparently, more and more government agencies are contracting with private entities to provide services to the military that traditionally were performed by the military.¹⁴⁹ This adds to the legion of those “accompanying” the Armed Forces.¹⁵⁰ There is no reason why those who are employed by contractors who contract with agencies other than the DOD should not be subject to the provisions of the Act, and an amendment to the Act has been introduced to accomplish that purpose.¹⁵¹ The void remaining after the Supreme Court decision denying court-martial jurisdiction over civilians has not yet been fully filled.

VIII. MEMOIR POST SCRIPT

Separated from military service after my completion of nearly three-and-a-half-years of active duty in 1959, I continued service as a U.S. Army Reserve JAGC Officer for several years thereafter. During my reserve service, I was promoted from First Lieutenant to Captain, JAGC. When I was constrained by the press of other public service duties to withdraw from further service in the reserves, I still held that rank, never having been promoted to the next rank, which would have made me Major Miner.

¹⁴⁸ See Renae Merle & Ellen McCarthy, *6 Employees From CACI International, Titan Referred to Prosecution*, WASH. POST, Aug. 26, 2004, at A18.

¹⁴⁹ Cf. Yost & Anderson, *supra* note 4, at 448–49 & nn.18–21.

¹⁵⁰ See *id.* at 448–49 & nn.18, 20–21.

¹⁵¹ See, e.g., MEJA Clarification Act, H.R. 4390, 108th Cong. (2d Sess. 2004).

